

Colas



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Kurt Manufacturing Company

File: B-236025

Date: October 5, 1989

DIGEST

1. Large business is an interested party to challenge contracting agency's decision to conduct procurement as total small business set-aside rather than including partial set-aside for labor surplus area (LSA) concerns since if protest were sustained and solicitation reissued with a partial LSA set-aside, firm would be eligible for award under the LSA portion of the solicitation.

2. Contracting agency's decision to conduct procurement as total small business set-aside rather than as partial labor surplus area set-aside was proper where based upon prior procurement history, contracting officer reasonably determined that severance of acquisition into two or more production runs would not be economical.

DECISION

Kurt Manufacturing Company protests the decision by the Naval Weapons Support Center (NWSC) to issue invitation for bids (IFB) NO. N00164-89-B-0014, for supplying fuze bodies, as a total small business set-aside rather than as a partial labor surplus area (LSA) set-aside.

We deny the protest.

As a preliminary matter, NWSC asserts that Kurt is not an "interested party" under our Bid Protest Regulations, 4 C.F.R. §§ 21.0(a) and 21.1(a) (1989), because the firm is not a small business under the IFB's standard industrial classification (SIC) code^{1/} and, therefore, would not be in

^{1/} The protest to our Office initially challenged the agency's use of SIC code 3354 which limits eligibility for award to small businesses employing fewer than 750 employees; however, the protester withdrew this ground of protest in its comments on the agency's report.

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line for award even if its protest that the agency is required to set aside the solicitation partially for LSA concerns were sustained.

The question of whether a party is interested depends on the nature of the issues being protested. Free State Reporting, Inc. et al., B-225531 et al., Jan. 13, 1987, 87-1 CPD ¶ 54. If Kurt were protesting an award to a particular small business firm, Kurt would not be an interested party because as a large business it would not be eligible for an award. Dragon Services, Inc., B-228912, Oct. 7, 1987, 87-2 CPD ¶ 344. However, Kurt is contending that no award should be made under the present solicitation because it was not set aside partially for LSA concerns. If we sustain the protest, the remedy would be cancellation of the current solicitation and issuance of a new solicitation encompassing a partial small business set-aside and a partial LSA set-aside. Since Kurt would be eligible for an award under the LSA set-aside portion of this new solicitation, we find that Kurt is an interested party to challenge the propriety of the agency's decision to issue the present IFB as a total small business set-aside rather than as a partial LSA set-aside.

Under the Department of Defense Federal Acquisition Regulation Supplement (DFARS) § 220.7003(a), a procurement is to be set aside partially for LSA concerns if the contracting officer determines that (1) the acquisition is severable into two or more economic production runs or reasonable lots; and (2) one or more LSA concerns are expected to qualify as LSA concerns and have the capability to furnish a severable portion of the acquisition at a reasonable price. In regard to determining whether a proposed acquisition is susceptible to division into two or more economic production runs or reasonable lots, the contracting agency is to consider the following factors: price and acquisition history of the items, startup cost including special tooling requirements, and the nature of the item and quantity being acquired. DFARS § 220.7003(a)(1)(ii).

Kurt contends that, under the DFARS, the contracting officer is required to set aside the present procurement partially for LSA concerns because the acquisition is severable into two or more economic production runs and one or more LSA concerns have the capability of furnishing the severable portion. Kurt states that, before the IFB was issued, it notified the contracting agency about its capabilities and requested that an LSA set-aside be implemented in accordance with the DFARS.

NWSC reports that the contracting officer and the NWSC Deputy for Small Business considered the possibility of including a partial LSA set-aside in the present procurement; however, the agency decided not to do so on the basis that the required quantity of 1800 fuze bodies is such a small amount that severance of the acquisition into two or more production lots is not economically feasible. Moreover, NWSC states that the agency lacked a reasonable expectation that a partial LSA set-aside would result in reasonable prices.

According to NWSC, the prior acquisition history relied upon by the contracting officer in deciding not to issue the IFB as a partial LSA set-aside demonstrates that the production of fuze bodies requires lengthy start-up engineering and computer program development. In this regard, the agency contends that start-up costs for the production would represent a substantial part of the total cost to produce the fuze bodies because, since the part is machined on high production automatic machines, the contractor would have to develop computer programs for the machining operations that would assure quality production. Moreover, the agency argues that the severance of this low production quantity into two runs is neither economically feasible for use of this expensive high production equipment nor would it be economical to produce the part on non-computer-operated equipment. Accordingly, NWSC maintains that the contracting officer's decision to set aside this procurement for small businesses rather than to set aside the procurement partially for LSA concerns was proper and in compliance with the DFARS.

The decision whether to set aside a particular procurement for LSA concerns basically involves a business judgment within the discretion of the contracting officer, and our review is limited to ascertaining whether that discretion has been abused. Jewett-Cameron Lumber Corp., et al., B-229582, Mar. 15, 1988, 88-1 CPD ¶ 265. Here, we find that NWSC's decision not to set aside the procurement partially for LSA participation was proper under the DFARS based on its determination that the acquisition is not severable into two or more economic production runs.

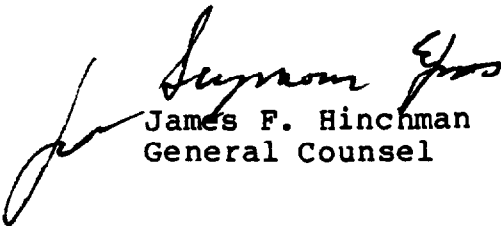
If the procurement were severed into two production runs, the substantial start-up costs would be duplicated and reflected in the prices of two contractors. In a procurement with such a relatively low quantity requirement as here, the contracting officer did not abuse his discretion by deciding to avoid the uneconomical costs associated with two production runs by issuing the IFB as a total small business set-aside rather than a partial small

business set-aside and a partial LSA set-aside. See Tracor, Inc., B-195736, Jan. 24, 1980, 80-1 CPD ¶ 69. Moreover, the contracting officer's decision is consistent with DFARS § 220.7002(a)(1), which makes clear that in no case will a price differential be paid for the purpose of carrying out an LSA set-aside.

Kurt disagrees with the agency's determination, arguing that based on its experience, splitting an acquisition of 1800 fuze bodies into two production lots is not uneconomical. Kurt's disagreement with the agency's position, however, is not sufficient to show that the agency's decision was unreasonable. See International Technology Corp., B-222792, June 11, 1986, 86-1 CPD ¶ 544. Kurt also argues that an examination it performed of certain solicitations issued by NWSC over a recent 3-month period shows that none of the procurements was set aside for LSA concerns. As a preliminary matter, Kurt has not identified the items included in its survey; it states only that they are items it is interested in supplying and which are "closely related by form, fit, and function to the disputed fuze body." In any event, we fail to see how the agency's actions on these procurements for other items have any bearing on the propriety of the agency's determination not to set aside a portion of the procurement at issue for LSA concerns.

Kurt requests reimbursement of its protest costs. There is no basis for allowing recovery of such costs, however, where, as here, there is no indication that the agency acted improperly. System-Analytics Group, B-233051, Jan. 23, 1989, 89-1 CPD ¶ 57.

The protest is denied.


James F. Hinchman
General Counsel